

CHEVAGANI (Migration) [2023] AATA 3333 (21 August 2023)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr Vijay CHEVAGANI

REPRESENTATIVE: Mr Owais Shaheen

CASE NUMBER: 2210050

HOME AFFAIRS REFERENCE(S): BCC2020/2160026

MEMBER: Margaret Forrest

DATE AND TIME OF ORAL DECISION AND REASONS: 21 August 2023 at 2:19 pm (QLD time)

DATE OF WRITTEN RECORD: 7 September 2023

PLACE OF DECISION: Brisbane

DECISION: The Tribunal affirms the decision not to grant the applicant a Student (Temporary) (Class TU) visa.

CATCHWORDS

MIGRATION – Student (Temporary) (Class TU) visa – subclass 500 (Student) visa – false or misleading information – a bogus document – a certificate of completion for a Diploma of Business course – failed to meet the criteria in PIC 4020(1) – requirements of PIC 4020 can not be waived – no compelling circumstances – decision under review affirmed

LEGISLATION

Migration Act 1958, ss 65, 499
Migration Regulations 1994, Schedule 2, cl 500.217

CASES

Arora v MIBP [2016] FCAFC 35
Batra v MIAC [2013] FCA 274
Trivedi v MIBP [2014] FCAFC 42
Kaur v MIBP [2017] FCAFC 184
Plaintiff M64/2015 v MIBP [2015] HCA 50

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 22 June 2022 to refuse to grant the visa applicant a Student (Temporary) (Class TU) Subclass 500 visa under the *Migration Act 1958* (Cth) (the Act).
2. At the hearing on 21 August 2023 the Tribunal made an oral decision and gave an oral statement of decision and reasons. The following is the written record of those reasons.

STATEMENT OF DECISION AND REASONS

3. The applicant applied for the visa on 25 August 2020. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of clause 500.217(1) of Schedule 2 to the Migration Regulations 1994 because the delegate was not satisfied that the applicant met Public Interest Criterion (PIC) 4020.
4. The applicant appeared before the Tribunal by telephone on 21 August 2023 to give evidence and present arguments. The applicant was assisted in this review by his registered migration agent. The applicant's representative, Mr Shaheen, appeared at the telephone hearing and made oral submissions.
5. The Tribunal exercised its discretion to hold the hearing by telephone. The Tribunal determined it was reasonable to hold the hearing by telephone having regard to the nature of this matter and the circumstances of the applicant. The Tribunal also had regard to the Tribunal's objective of providing a mechanism of review that is fair, just, economical, and quick, and the delay to the matter if the hearing was not to be conducted by telephone. The Tribunal is satisfied that the applicant was given a fair opportunity to give evidence and present arguments.
6. In the week prior to the Tribunal hearing, the Tribunal sent the applicant a copy of his records from the Provider Registration and International Student Management System known as PRISMS. The Tribunal indicated that the Member may refer to the applicant's PRISMS record during the hearing. On the basis of the applicant's PRISMS record is not relevant to the matters presently before the Tribunal, the Tribunal did not put the applicant's PRISMS record to him during the hearing. The Tribunal has made no adverse findings against the applicant as a result of anything in his PRISMS record and has not considered the record in making its decision.
7. For the following reasons the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl 500.217(1) for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and

- the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
9. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

10. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
11. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
12. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
13. The Tribunal told the applicant that it had, on the Department file, a certificate issued under section 376 of the Act. This certificate relates to two documents and indicates that the disclosure of this material would be contrary to the public interest because it would disclose lawful methods for preventing, detecting, and investigating breaches or evasions of the law which would or be likely to prejudice the effectiveness of those methods, or it would endanger the life or physical safety of a person. The Tribunal did not put the section 376 certificate to the applicant, nor the gist of the information it covers for the reason that the Tribunal considers the information it covers is not relevant to the matters presently before the Tribunal. The Tribunal has made no adverse findings against the applicant as a result of the information covered by the certificate and has not considered the information covered by the certificate in making its decision.

14. The Tribunal told the applicant that if the Tribunal affirmed that delegate's decision on the basis that the applicant did not meet PIC 4020, the applicant would be prevented from applying for certain types of visas for a period of three years from the date of the delegate's decision, which was 22 June 2022.
15. Although the applicant did not submit a copy of the delegate's decision to the Tribunal, the only information in the delegate's decision the Tribunal has relied on in making its decision was also contained in the natural justice letter that was sent to the applicant on 21 April 2022 and the applicant confirmed that he recalled receiving this letter.
16. The delegate refused to grant the applicant a visa on the basis that they were satisfied that the applicant had submitted a bogus document to the Department. That being a copy of a certificate of completion for a Diploma of Business course dated 15 July 2020, issued by the Institute of Advancing Careers, RTO ID 41388.
17. The natural justice letter includes the following information that is repeated in the delegate's decision.
 18. In the applicant's Student visa application, he declared that he had completed a Diploma of Business course in July 2020 and an Advanced Diploma of Business course on 14 November 2021. To support his claim, the applicant provided a copy of the certificate of completion of the Diploma of Business course dated 15 July 2020, issued by Institute of Advancing Careers, RTO ID 41388. The certificate of completion for the Advanced Diploma of Business course was not provided.
 19. On 14 September 2021, the Australian Skills Quality Authority, or ASQA, provided an evidentiary certificate to the Australian Border Force with the following disclosures;
 - Records or certificates issued by Training Organisation Victoria Pty Ltd, RTO ID 41388, were provided to ASQA on 5 March 2020, 7 July 2021, and 22 July 2021; and
 - These records indicate that there were no certificates issued between 30 January 2020 and 7 July 2021.
 20. As a result, the applicant's document could not have been genuinely issued by the training organisation purported to have awarded it.
21. The Tribunal asked the applicant if he remembered submitting the relevant document to the Department and the applicant said yes.
22. On the morning of the hearing, the applicant sent a written submission to the Tribunal that indicated that on 11 February 2022 he had asked the Department to withdraw his Diploma of Business. The applicant confirmed that it is correct that he did this.
23. The Tribunal asked why, and the applicant said he tried to contact the college and they were not answering. He said they were not responding when he was contacting the college about this issue.
24. The Tribunal asked to what issue the applicant was referring. The applicant said the issue with the Diploma of Business.
25. The Tribunal asked what alerted the applicant to the issue and he said other students. The Tribunal asked the applicant what issue he meant and he said the fake issue.

26. The Tribunal asked the applicant if he was accepting the relevant document was fake and he said yes. The applicant said, 'I finished the study. I applied for the visa', but he found out with Immigration that it was a bogus certificate. He said he tried to contact the college and they were not responding, and his agent also tried.
27. The Tribunal asked the applicant if he contended that he completed study relevant to a Diploma of Business with the relevant institute. The applicant said yes, he completed his Diploma of Business there.
28. The Tribunal asked what his explanation was for the fake document. The applicant said he did not know, he said he studied in the college. He said, 'I don't know what the reason for the bogus certificate is.'
29. The Tribunal asked the applicant if he recalled receiving the natural justice letter dated 21 April 2022 and the applicant said yes. The Tribunal asked the applicant if he responded to the letter and he said no, he said he thought he had already updated Immi Account.
30. In the written submissions the applicant submitted on the morning of the hearing, the applicant confirmed that on 11 February 2022 he sent the following to the Department:

Dear Concern, Hope you are doing well. I wish to withdraw the course mentioned "Diploma of Business due to the uncertain news that came across to me recently. I tried to contact the institute, but the college is not responding to any of my calls and emails. This is making me feel unsafe about my career and hence I have recently even a lodged a complaint against the institute for not being generous to answer my queries on the degree and the documents. Hence, I request you to kindly not to consider the Diploma of Business as the course of my study. I request you please withdraw the abovementioned qualification from my qualification. Kindly let me know if any further information is required from my end. I shall provide you all the requested documents and details.

Thank you in anticipation.

Regards,

Vijay Chevagani

31. The Tribunal asked the applicant when he first arrived in Australia and he said February 2019. The applicant said that he was first on a Student visa which expired in March 2021. He then submitted his current Student visa application on 25 August 2020.
32. The Tribunal asked the applicant if his first Student visa was ever cancelled and he said yes. The Tribunal asked why. The applicant said he could not study at the University of Adelaide because he came from a small town in India and he felt alone. He said he felt overwhelmed. When the Tribunal pressed the applicant, he said he could not remember why his visa was cancelled. The Tribunal has not made any adverse findings against the applicant in relation to the cancellation of his first Student visa and has not taken it into account in making its decision.
33. The Tribunal put to the applicant that what it needed to be satisfied of was that there was an element of fraud or deception by some person to attract the operation of PIC 4020. The applicant responded that he was talking to the college to rectify this. In his written submission submitted on the day of the hearing, the applicant requested a further two weeks to gather more information.

34. The Tribunal asked the applicant if he remembered receiving the hearing invitation for this hearing on 13 July 2023 and the applicant said yes. The Tribunal asked the applicant why he needed an extra two weeks. The applicant said he has only recently communicated with his agent. The Tribunal asked what the applicant was expecting to get within two weeks and the applicant said he was expecting something that explained why the document was like that.
35. The applicant's representative said that in relation to the applicant's Diploma of Business he was instructed that at the time of submitting the document, his client was "not aware", and from his perspective it was a genuine document. The applicant's representative said the applicant became aware in February 2022 when he submitted a request to his Immi Account, and at that time, until the issue was rectified, the applicant did not want to rely on this document. The applicant's representative said, in discussion with the applicant's current university agent, the applicant had asked the university agent to get a COE for him. He anticipated getting an explanation about the document within the next two weeks from the university agent.
36. The Tribunal asked if the applicant could produce something in writing that showed this contact with the university agent and the applicant's representative said it could be requested.
37. The applicant's representative said that at the time of submitting the document, the applicant did not think it was not a genuine document. The applicant's representative said that the applicant needed a couple of weeks because he anticipated getting from the university agent an explanation about why there are issues with the document when the applicant had completed the course, a Diploma of Business, and the certificate had been issued.
38. The Tribunal asked the applicant's representative why the request for extra time was only made on the day of the hearing. The applicant's representative said that it only came about recently, it was only within a week or so that this has developed. He said that the applicant only became represented recently, on Friday.
39. The applicant said that he's waiting for his college to respond.
40. The Tribunal asked the applicant if he now was resiling from his comment that the document was fake. The applicant said he studied there, he submitted documents to Immi, when he got the email from Immi, a lot of other people got similar emails and he said that maybe it is a bogus document.
41. The Tribunal again asked if the applicant was now not accepting the document was fake, and his response was that 'It might be. I don't know.' He said he had studied properly there.
42. The applicant accepted that he first contacted the college about his Diploma of Business in February 2022. The Tribunal asked why the applicant expected to have an explanation in the next two weeks when he had been trying to contact the college since February 2022. The applicant said, 'That's what I've been told by my agent'.
43. Based on the information in the natural justice letter, specifically the evidentiary certificates provided to Border Force from ASQA and the information contained in the evidentiary certificate, and also based on the applicant's acceptance that the document is either fake or might be fake, the Tribunal is satisfied that the applicant has submitted a bogus document to the Department.
44. The Tribunal notes that it must only be satisfied that some element of fraud or deception by some person is involved, and the Tribunal is so satisfied on the balance of probabilities. In

the circumstances outlined in paragraph 40 above, where the Tribunal's conclusion relies on official evidentiary certificates provided by ASQA, the relevant regulatory body for the education provider, any explanation that the applicant may be able to acquire from the college within the next two weeks does not change the outcome. The Tribunal also notes the applicant made the request on the day of the hearing despite knowing about the hearing since 13 July 2023 and despite attempting to contact his college since February 2022. The applicant also accepted at the hearing that the document was either fake or might be fake. In all of those circumstances, the Tribunal considered it was reasonable not to grant the applicant any additional time to acquire additional information.

45. Therefore, the applicant does not meet PIC 4020(1).

Should the requirements of PIC 4020(1) or (2) be waived?

46. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in reg 1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
47. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
48. For the following reasons the Tribunal is not satisfied that the requirements should be waived.
49. The Tribunal asked the applicant if there were any compelling circumstances affecting the interests of Australia and the applicant said no. The Tribunal asked the applicant if he had completed any study in Australia and he said he was studying cookery. The Tribunal asked the applicant if he was working in Australia and he said, 'Yes, as a delivery driver for Australia Post'.
50. The Tribunal asked the applicant if there would be any Australian citizens, permanent residents, or New Zealand citizens affected if he was not granted the visa and the applicant said no. The applicant confirmed he has no family or partner who meet the relevant criteria.
51. On the basis of the evidence before the Tribunal, the Tribunal is not satisfied that there are compelling circumstances that affect the interests of Australia, nor are there compassionate or compelling circumstances that affect an Australian citizen, permanent resident, or eligible New Zealand citizen. For clarity, nor was it submitted by the applicant that such circumstances exist.
52. Therefore, the requirements of PIC 4020(1) should not be waived.

Concluding paragraphs

53. On the basis of the above, the applicant does not satisfy PIC 4020 for the purposes of cl 500.217(1).

DECISION

54. The Tribunal affirms the decision not to grant the applicant a Student (Temporary) (Class TU) visa.

Margaret Forrest
Member

55. ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa; the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa; neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen; justify the granting of the visa.
- (5) In this clause:
- information that is *false or misleading in a material particular* means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.